UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

TYLER-CONNER, INC. D/B/A EDDINGTON & ASSOCIATES SECURITY [1]

Employer

and **Case No. 2-RC-22761**

INTERNATIONAL UNION, SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board, herein called the Board. The sole issue raised by the parties at the hearing concerned whether the Employer's operations have been, or are about to be, contracted to such an extent that an election cannot be conducted at this time. As set forth below, I have concluded that after the Employer experiences the layoffs that will result primarily from the loss of its two largest contracts, it will return to its long standing staffing level, which is a substantial and representative complement of employees, and that it is appropriate to conduct an election among the Employer's guards.

[1] The name of the Employer appears as amended at the hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Tyler-Conner, Inc. d/b/a Eddington & Associates Security, the Employer, is a New York corporation, having an office and principal place of business located at 2992 Homer Avenue, Bronx, New York. The Employer provides a variety of security services to corporate office buildings, commercial businesses and construction sites located in the Boroughs of Manhattan and Queens. During the past 12 months, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, purchased goods and services valued in excess of $50,000 directly from entities located outside the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that International Union, Security Police and Fire Professionals Of America is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Petitioner filed a petition seeking an election in a unit comprised of all security guards employed by the Employer. The parties stipulated and I find that this unit is an appropriate unit for bargaining. Notwithstanding the stipulation as to the unit issue, the Employer contends that the petition should be dismissed as the Employer has lost or imminently will lose, several contracts for service that it has maintained until recently. The loss of these contracts will result in the immediate layoff of all but about 30 of its employees. The Employer contends that the petition should be dismissed based on the Board's "contracting unit" doctrine.

Overview of the Employer's Operations

The Employer provides a variety of guard services to commercial customers and construction job sites in Manhattan and Queens. From its inception in 1990 until approximately 1999, the Employer maintained a complement of employees of about 30 to 35 employees. In 1999, the company was sold to the present owners, Jonathan and Lillian Hill. After the sale, Mark Eddington, the founder, remained with the Employer as a consultant, with the responsibility for business development and client relations.

Most recently, the Employer has employed approximately 200 licensed security guards. The dramatic increase in the number of guards employed by the Employer resulted in large part when, in 2001, the Employer acquired contracts to provide security at two large construction sites in Manhattan. One site, the construction of two office towers and a retail complex for AOL Time Warner at 59th Street and Columbus Circle, necessitated the hire of 65 to 70 guards. The

other site, the 16-acre tract of land that was the location of the World Trade Center destroyed in the disaster of September 11, 2001, and which has become a reconstruction site, required the hire of approximately 75 guards.[2]

In addition to these two large sites, the Employer also provides security at several other construction sites in Manhattan, a food warehouse in Queens, three health clubs in Manhattan, and two other office buildings in Manhattan. At each of these other sites, the Employer employs only one or two guards.

Changes in the Employer's business fortune

The Port Authority of New York and New Jersey, the owner of the World Trade Center site advised Tully Construction Company, which had contracted for the Employer's services at the site, by letter dated October 7, 2003, that the security contract for the site had been awarded to a new security company and that the Employer's services would be terminated on or about November 1, 2003. Tully informed the Employer of this development by letter dated October 9. While the Employer attempted to convince the new security provider to use it as a subcontractor, such overtures were declined. Mr. Eddington estimated that this action would result in the termination by the Employer of nearly 70 guards.

Also about the same time, the Employer received a letter from its contractor at the AOL construction site that as construction was nearing completion, its services would be terminated on December 15, 2003. Mr. Eddington testified that this action would result in the Employer terminating 65 guards.

[2] All 75 guards at the WTC reconstruction site with the exception of 3 holdover employees, were newly hired for this job.

In addition to the two largest construction site jobs that the Employer will lose shortly, they have also recently lost one of the three health club jobs when by letter dated September 11, 2003 their services were terminated. As the remaining two health clubs are owned and operated by the same entity, Mr. Eddington testified that he assumed the Employer would lose the other two job sites shortly. Two security guards were laid off upon the termination of the contract at the first health club and if the remaining two are also lost an additional 4 to 5 guards will be terminated.

Eddington also testified that construction jobs at three other sites were nearing completion in December and that the completion of the construction work would result in the completion of their contract to provide security services.

The Employer does not have any contracts at the present time for any new construction sites. Eddington estimated that with the above layoffs that are definite and with the other layoffs to occur shortly, the Employer's work complement would drop to about 30 to 35 guards, the Employer's pre-2001 staffing level.

Discussion

The Applicable Legal Standards

To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *Douglas Motors Corp*., 128 NLRB 307, 308 (1960). The Board will

determine whether an employee complement is representative and substantial so as to warrant holding an immediate election on a case-by-case basis, analyzing such factors as size of the employee complement at the time of the hearing, the nature of the industry, and the time expected to elapse before a full, or substantially larger, complement of employees is on hand. See *Clement-Blythe Companies,* 182 NLRB 502 (1970).

A mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will examine whether the reduction is a result of a "fundamental change in the nature of the Employer's business operations." *Douglas Motors*, supra. The Board finds an existing complement of employees to be "substantial and representative" when approximately 30 percent of the eventual complement is employed in 50 percent of the anticipated job classifications. See *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), relying on *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994).

The Employer argues that within two months of the hearing on this petition, its business will decline from its high water mark of approximately 198 employees to no more than 30 to 35 employees due to work already lost and work that it anticipates it will lose shortly. The Employer contends that this contraction is so dramatic and substantial that the petition should be dismissed as the Employer will employ less than 30% of its work complement. Petitioner, on the contrary, contends that the petition should be processed and workers should be given the opportunity to exercise their fundamental rights under Section 7 of the Act. The Petitioner further argues that this loss in business is unprecedented

and that while no new work is scheduled, the Employer continues to seek additional work. Additionally, the Petitioner contends that the "present work complement" must be viewed as of a date that is as late as possible. Citing *Plum Creek Lumber Co., Inc.*, 214 NLRB 619 (1974), Petitioner suggests that if the work complement is viewed as of the date of the Decision and Direction of Election, the Employer employs 123 employees. Assuming the election is conducted after December 16, the Employer complement will be 38 employees. Using either of these dates, the Petitioner contends the Employer employs more than 30% of the employees in the "present work complement".

The record reflects that the Employer's business involves providing security guard services to primarily construction sites in Manhattan and Queens, New York. Its work force remained at between 30 and 35 employees from its inception in 1990 until 2001, when the business experienced a sudden and rapid increase due to contracts it received to provide security services to large construction jobsites. These two contracts added almost 140 employees to the Employer's complement of employees. The boon in business enjoyed by the Employer lasted for just two years, before its work force returned to the level it had maintained for more than a decade.

The parties here have disagreed about the date on which the Employer's staffing level should be computed so that a determination can be made whether or not the Employer's "work complement" has been eroded sufficiently to deny the remaining employees the right to determine whether or not they want to be represented for the purpose of collective bargaining. It appears that the parties

do agree that despite the sudden reversal of business opportunities for the Employer, there has been no change in the number of classifications of employees employed by the Employer. There is also no disagreement over the nature of the Employer's business that has remained unchanged.

In applying the legal principles set forth above, it is most significant that after the various contracts described in the record have ended and the Employer's staffing level settles back to somewhere between 30 and 35[3], it will be at the level that the Employer maintained for over a decade. In deciding that this number of employees is substantial and representative, it is noted that the contracts the Employer obtained to provide services at the World Trade Center reconstruction site and at the AOL site were atypical of the Employer's business operations. These inflated numbers were temporary and the Employer's testimony reflects that these employees were hired for just those sites. There is no evidence that the Employer intended to continue the employment of these employees beyond the expiration of these contracts. Thus, I conclude that the Employer, as of mid-December, will be back to its customary and usual complement of employees and it is appropriate to conduct a representation election among the unit employees. See Pathology Institute, 320 NLRB 1050 (1996) To decide otherwise would result in disenfranchising the Employer's normal and longstanding unit of employees simply because the Employer entered into contracts to provide its services on a temporary basis with an uncharacteristically large number of employees. Thus I cannot agree with the

[3] The Petitioner in its brief does the mathematical computations and determines that based upon Eddington's testimony, there will be 38 employees left.

Employer's contention that the Employer's business has contracted to such a level that it no longer employs a substantial and representative complement of employees.

Even assuming that the dramatic increase in business that occurred in 2001 resulted in such a substantial increase to the Employer's work force and altered the Employer's regular complement of employees, I would still conclude that an immediate election is appropriate. On October 14, 2003, the date the petition was filed, the Employer had already received notice by letter dated October 7 that it had lost the contract at the World Trade Center reconstruction site. Thus, at that time, the Employer knew that those 70 guards it had hired for that site would be laid off by no later than November 1. Additionally, by letter dated October 8, the Employer had already been informed that the AOL construction site was nearly completed and the 65 guards it had hired to work there would be without work by no later than December 15. Thus by the time the petition was filed the Employer knew conclusively that 135 of its approximately 200 guards would be laid off by December 15. Thus when the petition was filed the Employer employed only about 65 employees with an expectation of continued employment. Accepting the Employer's contention that the remaining losses will reduce its work complement to 30 to 35 employees, the remaining losses when viewed in the context of the work force at the time of the petition and the date of issuance of this decision, will not result in a substantial loss of the Employer's complement of employees so that less than 30% of the workforce would still be employed and any reduction was not accompanied by a

fundamental change in the nature of the Employer's business operations or reduction in job classifications.

Based on the foregoing, including the stipulation of the parties, I find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time security guards employed by the Employer.

Excluded: All other employees, office clerical employees and professional employees and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time [4] and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[5] Eligible to vote are those in the unit who were employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic

[4] Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

[5] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20 of the Board's Rules, requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

replaced.[6] Those eligible shall vote whether they desire to be represented by International Union, Security, Police and Fire Professionals of America. [7]

Dated at New York, New York
November 20, 2003

(s) Celeste J. Mattina
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Code: 347-8020-6000

[6] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which my be used to communicate with them. *North Macon Health Care Facility,* 315 NLRB 359 (1994); *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **November 28, 2003.** No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[7] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by no later than **December 4, 2003**.